MBf Finance Bhd v Sri Hartamas Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D4–28–28–1989
ZAKARIA YATIM J
1 APRIL 1994

Companies and Corporations — *Winding up — Costs — Supporting creditors — Whether entitled to same costs as petitioner*

Companies and Corporations — *Winding up — Costs — Supporting creditors — Whether entitled to individual costs — Whether one set of costs awarded for all supporting creditors*

The respondent, Sri Hartamas Sdn Bhd, was wound up by order of court on 18 July 1991. On 24 September 1992, the senior assistant registrar allowed one of the supporting creditors of the winding-up petition, Tong Poh Wai, to have her bill of costs taxed at RM3,830.50 ('the bill of costs'). This application was brought by other housebuyers, who claimed to be supporting creditors, for the bill of costs to apply to all of them for the same amount each.

Held, dismissing the application:

(1) The principle of awarding costs in a winding-up case is that the petitioner should be given one set of costs and the supporting creditors another set of costs. As a general rule, no order for costs will be made in favour of one creditor against another creditor because a winding-up petition is not a true lis but a class remedy sought in the interests of creditors as a whole.

(2) In this case, the applicants appeared to apply for a series of costs to themselves and this could not be allowed. The petitioner, MBf Finance Bhd, was entitled to a set of costs and all the supporting creditors were entitled to another set of costs to be taxed. Tong Poh Wai was not entitled to apply for the costs to be taxed individually and the order of the senior assistant registrar was set aside.

[Bahasa Malaysia summary

Responden, Sri Hartamas Sdn Bhd, telah digulung mengikut suatu perintah mahkamah pada 18 Julai 1991. Pada 24 September 1992, penolong kanan pendaftar telah membenarkan salah satu daripada pemiutang yang menyokong petisyen penggulungan itu, Tong Poh Wai, untuk menetapkan bil kosnya pada jumlah RM3,830.50 ('bil kos itu'). Permohonan ini telah dibawa oleh pembeli rumah yang lain, yang menyatakan bahawa mereka merupakan pemiutang yang menyokong petisyen itu, supaya bil kos itu terpakai kepada mereka semua dengan jumlah yang sama setiap orang.

Diputuskan, menolak permohonan itu:

(1) Prinsip mengaward kos di dalam suatu kes penggulungan adalah bahawa pempetisyen seharusnya diberikan satu set kos dan pemiutang yang menyokong petisyen itu diberi satu set kos yang lain. Sebagai peraturan am, perintah mengenai kos tidak akan dibuat memihak kepada seseorang pemiutang terhadap pemiutang yang lain kerana suatu petisyen penggulungan bukannya suatu guaman yang sebenar tetapi merupakan suatu remedi kelas yang dipohon demi kepentingan pemiutang secara keseluruhan.

(2) Di dalam kes ini, pemohon-pemohon nampaknya memohon untuk suatu siri kos untuk diri mereka sendiri dan ini tidak boleh dibenarkan. Pempetisyen, MBf Finance Bhd, berhak mendapat satu set kos dan semua pemiutang yang menyokong petisyen itu berhak mendapat satu set kos yang lain yang akan ditetapkan. Tong Poh Wai tidak berhak memohon supaya kosnya ditetapkan secara berasingan dan perintah penolong kanan pendaftar itu diketepikan.]

Notes

For cases on costs in winding-up proceedings, see [1990] Mallal's Digest 118–119.

Cases referred to

1 *Re Humber Ironworks Co* (1866) LR 2 Eq 15 (folld)
2 *Re New Gas Co* (1877) 5 Ch D 703 (folld)

Ong Ban Chai (*Ong Ban Chai & Co*) for the supporting creditors.
Noorin bte Badaruddin (Federal Counsel) for the respondent.

Zakaria Yatim J: This is an application for costs by 63 housebuyers, who claimed to be supporting creditors on the petition for the winding up of Sri Hartamas Development Sdn Bhd. Sri Hartamas was wound up by the order of the court on 18 July 1991. On 20 March 1992, Mr Ong Ban Chai, who said that he appeared for 64 supporting creditors, applied that costs be granted to the supporting creditors. The petitioner and the Official Receiver did not object to the application and I made an order allowing costs to the supporting creditors to be taxed.

In their application, the 63 housebuyers asked for an order of the court that:

(a) the bill of costs of a supporting creditor, Tong Poh Wai, as taxed at RM3,830.50 should apply to all the other 63 supporting creditors on the same amount each;
(b) the respondent do pay all the 63 supporting creditors costs of RM241,321.50 (that is, RM3,830.50 x 63); and
(c) the costs of the application be costs in the cause.

The application is supported by the affidavit of Mr Ong Ban Chai, affirmed on 19 October 1992. In the affidavit, he averred that he was the solicitor for

A the 64 supporting creditors in the winding-up petition. He said that on 16 May 1992, he filed a notice of taxation and bill of costs for one of the supporting creditors, Tong Poh Wai, and on 24 September 1992, the bill of costs was taxed at RM3,830.50 by the senior assistant registrar.

At the hearing of the application, Puan Noorin, Federal Counsel in the Official Receiver's Office, opposed the application. She disputed that all the B applicants had filed their intention to appear on the hearing of the petition under r 28 of the Companies (Winding-Up) Rules 1972. She said that she had gone through the court file and found in encl 48, there were only 28 supporting creditors and that none of the applicants' names were listed in that enclosure. She referred to the affidavit of Puan Rodiah bte Ali, the C senior assistant official receiver (encl 116) where the deponent averred that Sri Hartamas was indebted to 28 supporting creditors and the total amount of debt owing was RM158,129,289.69. The deponent said the total debts due to the 64 supporting creditors would be RM538,084. The amount of debt due to the petitioner was RM5,197,060.82. The deponent said that if the application was allowed it would mean that the 63 applicants would get D a total sum of RM241,321.50 as costs.

Mr Ong Ban Chai said that under r 28, there was no requirement to file an intention to appear in the court registry. Under the rule, the intention to appear must be served on the petitioner. Mr Ong Ban Chai also said that he was prepared to accept a sum of RM500 as costs for each of the 63 E applicants instead of the amount claimed in the application. Puan Noorin did not accept Mr Ong Ban Chai's offer.

The hearing was then adjourned to another date.

At the resumed hearing, Puan Noorin told the court that her department had received the complete list of supporting creditors from the solicitors for the petitioner. She said that according to the list there were only 46 F supporting creditors who were represented by Mr Ong Ban Chai. Mr ET Soon, who appeared for the applicants on behalf of Mr Ong Ban Chai, did not dispute Puan Noorin's statement.

At the previous hearing, Puan Noorin submitted that the principle of awarding costs in a winding-up case was that the petitioner should be given G one set of costs and the supporting creditors another set of costs. She referred to 7(2) *Halsbury's Laws of England* (4th Ed) at p 1128; and 6 *Buckley on the Companies Act* (14th Ed), at pp 550 and 551. At the resumed hearing, Mr ET Soon agreed with the principle stated by Puan Noorin and he, too, referred to *Buckley on the Companies Act* at p 552. Puan Noorin also cited a number of English cases. There is, however, no reported H case on this point in this country.

I shall now examine the authorities. *Halsbury's Laws of England* states in para 1481 that '... one set of costs is generally given to the petitioner, another among all the creditors supporting him and a third among all the contributories supporting him'. *Halsbury* further states that as a general I rule, no order for costs will be made in favour of one creditor against another creditor because a winding-up petition is not a true lis but a class remedy sought in the interests of creditors as a whole. *Buckley* also states the same principle.

In *Re Humber Ironworks Co*,[1] Lord Romilly MR in his judgment at p 18 said:

> Where the court grants the prayer of the petition, of course it will give no costs to persons who appear to oppose the petition; because in that case the court makes an order against them: it gives the costs of the petitioner and those of the company out of the estate; and if a number of persons, whether shareholders or creditors, appear to ask for an order to wind up the company, in that case I am of opinion that the court ought to allow, out of the estate, one set of costs amongst them all, and they must arrange between themselves in what manner they are entitled to such costs. I will not allow a series of costs to them.

In *Re New Gas Co*,[2] the Court of Appeal decided that supporting creditors are entitled to one set of costs. In his judgment at p 704, Jessel MR said:

> The advetisement which the company was bound to issue under the General Rules of 1862 says, 'Any creditor or contributory of the said company desiring to oppose the making of an order for the winding-up of the said company under the above Act, should appear at the time of hearing, by himself or his counsel, for that purpose.' You have, therefore, invited the creditors to appear and oppose. I think they had a right to appear, and being successful they are entitled to one set of costs.

Applying the principles laid down in the authorities cited above to the present case, the petitioner is entitled to a set of costs and all the supporting creditors are entitled to another set of costs. The applicants appear to apply for a series of costs to themselves. Lord Romelly MR in the passage quoted above said that the court would not allow a series of costs to the supporting creditors.

In my opinion, Tong Poh Wai was not entitled to apply for the costs to be taxed individually and the order of the senior assistant registrar should be set aside.

For the reasons stated above, I made the following order,

(1) The order of the senior assistant registrar dated 24 September 1992 allowing costs to a supporting creditor, Tang Poh Wai, be set aside.
(2) The petitioner will get a set of costs, and all the 74 supporting creditors, (ie 28 + 46) who filed their intention to support the petition will get another set of costs to be taxed.
(3) The set of costs for all supporting creditors will be taxed only after the bill of costs of the petitioner has been taxed if there is such application for costs to be taxed.
(4) The present application (encl 110) is hereby dismissed with costs.

Application dismissed.

Reported by Anne Khoo